In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 292

HEINRICH F. G. H. MOLSEN,
Petitioner and Appellant Below,

v.

WALTER YOUNG, Inspector in Charge, U. S. Immigration and Naturalization Service,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully show to this Honorable Court as follows:

SUMMARY OF THE MATTER INVOLVED

This case arose under Section 711 of the Nationality Code of the United States, providing for the naturalization of an alien whose wife is a naturalized citizen of the United States, and was tried before the Honorable William H. Atwell, Judge, without a jury. On June 25, 1949, the Court overruled the recommendation of the Naturalization

Examiner and rendered judgment denying petitioner's petition for naturalization. (R. 50.)

On appeal the Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court (R. 69), and denied petitioner's motion for a rehearing. (R. 77.)

Petitioner is a German national who entered the United States in 1925 (R. 43); his wife is a naturalized American citizen, and his three children (born 1935, 1940 and 1945) are all native-born American citizens; petitioner and his family reside in Dallas, Texas, petitioner being engaged in the cotton business in this city. (R. 40.) Petitioner's petition for naturalization was filed under the provisions of Section 711 of the Nationality Act of 1940, on August 16, 1948. (R. 41.)

There were two hearings of this case by the trial court, the first being on March 12, 1949 (R. 1), and the second being on June 25, 1949. (R. 23.) At the first hearing, the Court passed the case over until the June 25th hearing because of certain undisclosed "information" which the Court had received during the first hearing and which he referred to the Examiner. (R. 22.) The only new information developed subsequent to the first hearing was that contained in four affidavits (R. 33-38), the nature of which was unknown to petitioner until they were read in the second hearing and which petitioner says were improperly considered by the trial court. At each hearing, the Immigration and Naturalization Service recommended that petitioner's petition be granted; however, the service thought that there was certain information as to the pe-

titioner's past, contained in its report, of which the Court should be informed. Summarized, this information (which is the only information in any way adverse to the petitioner) is as follows:

A. Connection with Nazi Party: In 1935, petitioner applied for membership in the Nazi Party, as stated in the Examiner's Report:

> "The petitioner has testified that, while temporarily in Germany on one occasion he applied for membership in the Nazi Party. He states that he did so for the purpose of protecting his mother who resided in that country and who was in danger of persecution because of her Anti-Nazi sentiments. He has stated that he believes that some further action was necessary, after the submission of the application, to become a member of the Nazi Party; that he took no further action; and that with the exception of any fees which may have been paid at the time the application was submitted, he did not at any time thereafter pay any dues to the Nazi Party." (R. 7.)

However, whether or not petitioner actually became a member is not clear. Certain membership lists found by the United States Army in Germany indicated that he had a Party number (R. 44) but the information was not competent inasmuch as the record referred to was unauthenticated and the War Department (which furnished it) expressly refused to vouch for its authenticity (R. 49); however, the question of whether he did or did not actually become a Party Member in 1935 was not thought to be material to the case because, as stated by the Examiner's Report:

> "In connection with the question of whether the petitioner merely made an application for membership

in the Nazi Party or actually became a member of that Party, the record is not entirely clear. However, assuming that he did, in fact, become a member in 1935, and giving consideration to his testimony that he never paid any dues to the Nazi Party, it will be observed that there is no evidence whatever to indicate that he was a member of the Nazi Party during the ten years preceding the filing of his petition. Under the circumstances, it is unnecessary to consider the question of whether the Nazi Party was an organization within the purview of Section 305 of the Nationality Act of 1940." (R. 46.)

B. Two letters to Germany written to persons in Germany in 1940, about one and one-half years prior to America's entry into the war, and eight years prior to his application for citizenship. These letters were in praise of recent German military victories and stated that the United States might be the last country which follows in step but that it must. (R. 44-45.)

With reference to these letters, the Naturalization Examiner said in his report:

> "The two letters written by the petitioner in 1940, prior to the entry of the United States into World War II, clearly indicate a strong pro-German attitude on the part of the subject at that time. However, this was long prior to the commencement of the statutory period. No evidence has been developed of any statements or conduct of the petitioner, subsequent to the entry of the United States into World War II, which would show any loyalty of the petitioner toward Germany or any disloyalty to the United States. During the periods while the petitioner was on parole as an alien enemy, he appears to have complied strictly with the terms of the parole, and there is no information of any adverse nature during the statutory period. It is concluded, therefore, that the petitioner has established attachment to the principles of the Constitution and favor-

able disposition to the good order and happiness of the United States for the period required by law." (R. 46.)

C. Four affidavits [the consideration of which by the trial court was urged by the petitioner as error in the Court of Appeals for the reason that he had never been confronted by the persons making those affidavits in any preliminary hearing as required by Section 733 of Title Eight of the U. S. C. A. (see appendix), and had never been apprised of their contents until they were read during the second hearing in the trial court] show that prior to the war, petitioner was seen by two witnesses in company with other Germans on several occasions giving the German salute to a German flag placed on a table at which they were eating (R. 33 and 37); that, in 1939, two other witnesses saw the petitioner and several other Germans clap their hands in elation over news that Germany had overrun Austria. (R. 35-36.)

All of this evidence referred to activities of the petitioner prior to the beginning of the five-year period [Section 707(a), Title Eight, U. S. C. A. (see appendix)], before the filing of his application for naturalization. The only evidence relating to petitioner during the five-year period is the testimony of five witnesses in behalf of petitioner to the effect that he was a man of good moral character and recommending him for citizenship. (R. 13-17.)

However, the trial court disregarded the evidence as to petitioner's attachment to the Constitution during the five-year period and the Court of Appeals affirmed the action of the trial court wherein it relied on petitioner's activi-

ties long prior to the statutory five-year period in its find-
ing that the petitioner, at the time of his application for
citizenship, was not attached to the principles of the Con-
stitution of the United States. (R. 52.) The Court of Ap-
peals failed to pass or rule upon the alleged error of the
trial court in basing its decision on hearsay affidavits
improperly admitted into evidence in violation of Sections
733 and 734 of Title Eight of the U. S. C. A. (see ap-
pendix), since these statements were not obtained at any
preliminary hearing at which petitioner was present and
petitioner was not apprised of their nature until they were
read in open court, these adverse witnesses not being pres-
ent in court or ever being confronted by petitioner, thereby
affirming the action of the trial court in this regard.

It is to review such action of the Court of Appeals tha
certiorari is sought.

JURISDICTIONAL STATEMENT

(1) The Supreme Court has jurisdiction to review th
judgment here in question under Title 28, United State
Code, Section 1254(1).

(2) The date of the judgment of the United State
Court of Appeals is May 26, 1950. (R. 69.) Petition fo
rehearing was filed on June 12, 1950 (R. 70), and wa
denied on June 23, 1950. (R. 77.)

(3) It is contended that the Supreme Court has an
should exercise jurisdiction to review the judgment her
because the Court of Appeals has refused to expressly rul
or pass upon the alleged error of the trial court and there

by impliedly affirmed its action wherein it deprived petitioner of a hearing as afforded him by Sections 733 and 734 of Title Eight of the U. S. C. A. and because the decision of the Court of Appeals for the Fifth Circuit affirming the judgment of the trial court to the effect that acts of the petitioner prior to the statutory five-year period could be relied upon to deny his naturalization is directly contrary to the decisions of the Court of Appeals for the Seventh Circuit in *Application of Murra*, 178 F. 2d 670, and the Court of Appeals for the Fourth Circuit in *Schwab v. Coleman*, 145 F. 2d 672, holding that acts prior to the five-year period could not be relied upon in denying citizenship.

QUESTIONS PRESENTED

1. The first question is whether acts of a petitioner for naturalization before the beginning of the statutory five-year period as provided in Section 707(a) of Title Eight of the U. S. C. A. (see appendix), can be relied upon by the trial court in finding that the petitioner, during the five-year period and at the time of the final hearing, was not attached to the principles of the Constitution of the United States and in denying the petitioner's naturalization.

2. The second question is whether the action of the Naturalization Examiner, in securing ex parte affidavits of adverse witnesses to a petitioner's naturalization out of the presence of the petitioner, constitutes a preliminary hearing as prescribed in Section 733 of Title Eight of the U. S. C. A. (see appendix) and whether the introduction of these affidavits into evidence in the final hearing without

the petitioner ever having the right to cross-examine these witnesses and to confront them and whether the decision of the trial court based on incompetent evidence constitutes a full hearing as prescribed by Section 734(a) of Title Eight of the U. S. C. A. (see appendix).

3. The third question is whether the petitioner should have been given a chance to refute these ex parte hearsay affidavits by positive evidence which he could have produced.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Court of Appeals held that the trial court was not limited, in its inquiry concerning the petitioner's alleged attachment to the principles of the Constitution and good moral character, to the statutory five-year period [Section 307(a) of the Naturalization Act, Title Eight, U. S. C. A., Section 707(a)], prior to the filing of the petition for naturalization, and affirmed the trial court's denial of petitioner's naturalization based on acts committed prior to the beginning of this period. In so doing, it held directly contrary to the opinion of the Court of Appeals for the Seventh Circuit in the case of *Application of Murra*, 178 F. 2d 670, and the decisions of other Courts of Appeals therein cited.

This conflict in the interpretation of Section 707(a), Title Eight, U. S. C. A. of the Nationality Code is of sufficient importance and of sufficient general public in-

terest as to warrant the exercise by the Court of its power of supervision so as to decide this question which has never before been decided by this Court.

The Court of Appeals, in failing to rule upon the alleged error of the trial court, impliedly affirmed its action wherein it accepted into the evidence certain ex parte affidavits never obtained in any preliminary hearing at which the petitioner was present, and decided that petitioner was not attached to the Constitution based on this incompetent hearsay evidence and against the weight of the competent evidence adduced at the trial that the petitioner was so attached.

The action of the Court of Appeals in condoning the procedure followed below by the trial court, wherein none of the elements of a fair hearing were present, is such a marked departure from Sections 733 and 734 of Title Eight of U. S. C. A. (see appendix), prescribing that a hearing shall be had, as to justify exercise by the Court of its power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the Fifth Circuit and in the case numbered and entitled on its docket No. 12,959, Heinrich F. G. H. Molsen,

Appellant v. Walter Young, Inspector in Charge, United States Immigration and Naturalization Service, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Fifth Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated August 18, 1950.

Respectfully submitted,

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WALTER YOUNG, Inspector in Charge, U. S. Immigration and Naturalization Service,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion for the Court of Appeals for the Fifth Circuit (R. 61) is reported in 182 F. 2d 480.

JURISDICTION

A complete statement of the basis and reason for exercising jurisdiction by this Court is given in the Petition for Certiorari. In the interest of brevity it is omitted here.

STATEMENT OF THE CASE

A full statement has been made in the Petition for Certiorari and is omitted for brevity.

SPECIFICATIONS OF ERROR

The Court of Appeals erred:

1. In holding that the trial court could consider, and base its denial of petitioner's naturalization on, events that occurred prior to the statutory period of five years of good behavior and attachment to the Constitution required by Section 707(a), Title Eight, U. S. C. A. (see appendix).

2. In affirming the action of the trial court wherein it considered and based its judgment that petitioner was not attached to the principles of the Constitution on ex parte hearsay affidavits not made in any hearing at which the petitioner was present to be confronted by these witnesses.

3. In affirming and condoning the action of the trial court wherein it failed to call petitioner's adverse witnesses and to give petitioner the opportunity to cross-examine these witnesses, thereby depriving the petitioner of the hearing afforded him by Section 734(a), Title Eight, U. S. C. A. (see appendix).

4. In affirming the judgment of the trial court which was against the weight of the competent evidence introduced below and based on incompetent hearsay evidence.

SUMMARY OF ARGUMENT

Petitioner says that the Court of Appeals has utterly misinterpreted Section 307(a) of the Nationality Code, and Section 707(a), Title Eight, U. S. C. A. (see appendix), in holding that the trial court may base its denial of naturalization on acts of the petitioner committed before

the five-year period and in saying that good behavior and ~~and~~ attachment to the Constitution for five years preceding the application for naturalization is the minimum requirement. This is in direct conflict with the interpretations made by the other Courts of Appeal, notably the Seventh Circuit Court of Appeals in the case of *Application of Murra*, 178 F. 2d 670.

In refusing to decide the question of the alleged error of the trial court, wherein it considered and based its decision on hearsay affidavits, petitioner also says that the Court of Appeals affirmed the action of the trial court and therefore erred in condoning the procedure followed by the trial court in violation of Sections 733 and 734, Title Eight, U. S. C. A. (see appendix).

ARGUMENT

I.

Five Years of Good Behavior and Attachment to the Constitution is All that is Required for Naturalization of an Alien.

The Court of Appeals erred in affirming the judgment of the trial court to the effect that the acts of the petitioner occurring prior to the five-year statutory period could be relied upon by the Court in denying petitioner his application for naturalization, since there was no adverse evidence against the petitioner during this five-year period.

The holding of the Court of Appeals herein is clearly erroneous and is in direct conflict with the holding of the

Court of Appeals for the Seventh Circuit in the case of *Application of Murra*, 178 F. 2d 670, which was also a naturalization case and very similar to the case before this Court on petition for certiorari. The Court of Appeals in petitioner's case said, on page 6 of its opinion (R. 66):

> "We find no merit in the contention that the trial court in its inquiry concerning the petitioner's alleged attachment to the principles of the Constitution and good moral character, was limited to the statutory five years prior to the filing of the petition for naturalization. The statute does not require that the evidence necessary to meet the test of loyalty and good character be confined to the five year period. It merely disqualifies for citizenship those who can not show the requisite loyalty and good moral character for at least five years prior to their application, and thereby fixes the minimum requirement as to these statutory qualifications which petitioners for citizenship must meet. See *In re Ross*, 188 Fed. 685; *United States v. Etheridge*, 41 F. 2d 762, 763-764; *Petition of Gabin*, 60 Fed. Supp. 750; *In re Laws*, 59 Fed. Supp. 179, 181; *Petition of Ludecke*, 31 Fed. Supp 521, 523." *Molsen v. Young*, 5 Cir., 182 F. 2d 480 at p. 483.

In the *Murra case* the opinion shows that the petition for naturalization was filed on November 21, 1944, and that hence the five-year period would commence on November 21, 1939. The Court quotes from the findings of fact made by the trial court on the second hearing wherein the trial court found Murra attended meetings of the Communist Party from January, 1935, to July, 1936; that in 1935 he was associated with and influenced by Communists; that on June 20, 1935, and July 28, 1935, he was arrested in the City of Chicago for inciting racial disturbances; that in February, 1937, he left the United

States to fight with a foreign army in Spain where he remained until the Fall of 1939. The Court then notes that, with one exception, every finding contained therein relates to matters and incidents which occurred prior to November 21, 1939. The Court said at page 672:

> "In view of the findings subsequently referred to, made in response to our previous direction, as well as the argument here relied upon by the government, we think a further construction of Sec. 307(a) of the Nationality Act of 1940, 54 Stat. 1142, 8 U. S. C. A. Sec. 707(a), is required, insofar as it relates to the length of time during which a petitioner must meet the conditions thereby imposed. The statutory provision so far as presently material provides in substance that no person shall be naturalized unless 'immediately preceding the date of filing petition for naturalization,' he has for at least five years 'been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.'
>
> "The Government contends that this provision 'fixes the minimum requirements that a petitioner for naturalization must meet, *(but the naturalization court may)* inquire into the entire life history of the petitioner to ascertain his true character and inclinations and it is incumbent upon the petitioner for naturalization to answer all pertinent questions and to honestly and truthfully disclose the facts bearing on his moral conduct.' A number of district court opinions are cited in support of this contention, the most relevant being *In re Taran*, D. C., 52 F. Supp. 535; *Petition of Gabin*, D. C., 60 F. Supp. 750; *In re Balestrieri*, D. C., 59 F. Supp. 181. This theory of the government and of the cases which support it is contrary to the overwhelming weight of authority.
>
> "In *Petition of Zele*, 2 Cir., 140 F. 2d 773, 776, the court stated:

" 'Under the law the burden is on the petitioner to establish good moral character only during the five-year period, not earlier.' *Petition of Zele*, 2 Cir., 127 F. 2d 578; *United States v. Clifford*, 2 Cir., 89 F. 2d 184; *United States v. Rubia*, 5 Cir., 110 F. 2d 92; *In re Aldecoa*, D. C., Idaho, 22 F. Supp. 659, 661. And it has consistently been construed liberally so as to sanction forgiveness after the expiration of five years from the date of a disbarring misdeed. * * *

"We are of the view that these numerous courts have correctly construed the provision in question. The wording of the statute itself leaves little room for doubt. If a five year period is a 'minimum requirement,' as the government argues, it becomes meaningless. If that time fixed by Congress is 'minimum,' then it would seem to follow that the maximum time would be during all of the petitioner's life. We cannot believe that Congress meant other than what it said, that is, that if a petitioner meets the enumerated requirements for a period of five years immediately prior to the filing of his petition he is entitled to be admitted. We need not decide that a court is never justified in making inquiry concerning a petitioner previous to the five year period, but what we do think and hold is that even so the facts developed by such an inquiry cannot be used as the basis for disqualification."

In the case of *Schwab v. Coleman*, 4 Cir., 145 F. 2d 672, the Court said, at page 675:

"The statute in its general provisions requires five years' residence and proof of good character and attachment to the Constitution during such period [8 U. S. C. A., Sec. 709(a) and (b)]; and there is nothing in the provision as to naturalization of aliens which requires proof with respect to matters prior to such five year period. For the court to impose as a condition of naturalization that an examination be made as to the background of petitioner preceding his coming to this country, where he has resided for five years or

> more, and in a country where it cannot be made because of war conditions, is not only to add to the requirements which the applicant must meet a condition which Congress has not imposed, but is also, insofar as the condition is insisted on, to nullify the provision of the statute which permits the naturalization of enemy aliens."

It will be seen that the Court of Appeals for the Fifth Circuit had all of these cases before it, petitioner having filed a reply brief in order to point out the *Murra case* to the Court, when it decided that petitioner's naturalization should be denied and affirmed the trial court in its reliance on acts of the petitioner prior to the statutory five-year period in determining that petitioner was not attached to the principles of the Constitution and thereby refused to follow the line of authority as set by the other Courts of Appeal. This question has never been directly decided by the Supreme Court and the error of the trial court and the Court of Appeals is material in this case as is shown in the report of the naturalization examiner (R. 32) wherein he stated:

> "No evidence has been developed of any statements or conduct of the petitioner, subsequent to the entry of the United States into World War II, which would show any loyalty of the petitioner toward Germany or any disloyalty to the United States. During the periods while the petitioner was on parole as an enemy alien he appears to have complied strictly with the terms of the parole, and there is no information of an adverse nature during this statutory period. It is concluded, therefore, that the petitioner has established attachment to the principles of the Constitution and favorable disposition to the good order and happiness of the United States for the period required by law.

> "It is the recommendation of the Service that the petitioner for naturalization, Heinrich Frederick Gustave Herman Molsen, be granted."

In its reliance upon the petitioner's acts committed before the five-year statutory period and in its findings that the petitioner was not attached to the principles of the Constitution of the United States, the trial court's decision is against the recommendation of the Naturalization Examiner and against the weight of all of the competent evidence produced at the final hearing, and this decision was affirmed by the Court of Appeals for the Fifth Circuit. Petitioner submits that this was in error and that his petition for certiorari should be granted in order that the Supreme Court may correct this error and decide an important question of interpretation of the Nationality Act which has not been decided by the Supreme Court and in which the Court of Appeals for the Fifth Circuit is not in agreement with the other Courts of Appeal.

II.

Sections 733 and 734, Title Eight, U. S. C. A., Affording Petitioners for Naturalization A Hearing, Do Not Permit the Denial of Naturalization Based on Hearsay Affidavits Made by Witness Never Confronted or Cross Examined by a Petitioner.

The record shows that the first hearing on petitioner's naturalization petition was continued for the purpose of conducting a further investigation into the matter as directed by the trial court (R. 22) upon information received by the Court from some outside and undisclosed

source. At the second hearing the Naturalization Examiner stated to the Court that, in compliance with its direction, he had secured statements from witnesses which he read to the Court as his further investigation of the case. These four affidavits, read to the Court and made by people who stated that they wished to oppose petitioner's citizenship, contained highly derogatory and prejudicial statements against the petitioner. (R. 32-38.) They were all hearsay and contained hearsay statements concerning petitioner's activities prior to the statutory five-year period. Immediately after reading these affidavits, the Naturalization Examiner proceeded to make recommendations on fifty-eight other naturalization petitions pending in the same Court and being considered at the same time by the Court. The Court then began reading off the petitioners by name only and disposing of each by saying approved or continued, and when the trial court reached petitioner's name he summarily announced "Denied." (R. 39.) It is submitted that the Naturalization Examiner held no preliminary hearing as to this new matter, as required by Section 733, Title Eight, U. S. C. A. (see appendix). The petitioner was not apprised as to what this new matter was (R. 33) until he heard it read in Court by the Naturalization Examiner at the second hearing, and he had no opportunity to prepare to meet it. He was never confronted by these adverse witnesses (R. 33) or given the opportunity to cross examine them under oath.

Elements of a fair hearing include the right to be apprised of the evidence against one, the right to be confronted by one's accusers, to hear their testimony under

oath, and to cross examine them. *Petition of Kohl*, 2 Cir. 146 F. 2d 347.

As was said in the case of *Petition of DeLeo*, D. C. Penna. 75 Supp. 896 at page 899:

> "It would be extremely unfair and irregular for the Court to deny an application for citizenship on suspicion, and it would be depriving petitioner of his Constitutional rights to not have an opportunity to face those who accuse him of immoral conduct. * * *"

Since none of the elements of a hearing were present in the Naturalization Examiner's supplemental investigation where he merely secured affidavits of persons who wished to oppose petitioner's naturalization, out of the presence of the petitioner (R. 83), it is our contention that the trial court, in not requiring petitioner's adverse witnesses to be present and to testify under oath in the second hearing held on June 25, 1949 (R. 33-39), violated Sec. 734(a), Title Eight, U. S. C. A., requiring witnesses to be examined under oath in the presence of the Court if no preliminary hearing had been held.

In the case of *Petition of Kohl*, 2 Cir., 146 F. 2d 347, the denial of a naturalization petition was reversed because of the reception by the trial court and consideration of ex parte affidavits. The Court of Appeals for the Second Circuit stated at page 348 of the opinion:

> "Thus against the hearsay statement attributed to one of Appellant's former employers to the effect that Appellant was not anxious to fight in the United States Army and was out to make money while American boys were dying, there is Appellant's own testimony that the employer had told him he would give him a

good recommendation to the Government agents who have made inquiries * * *.

"Had there been any thought of relying on this contradictory evidence as a basis for exclusion the witnesses should have been produced and the contradiction resolved."

In the case of *Petition of Zele*, 2 Cir., 127 F. 2d 578, no witnesses were produced in the final hearing; only affidavits were read to the trial court, and the Court of Appeals said, at page 580 of its opinion:

"The order of denial (of naturalization) should be reversed and a further hearing should then be had before the Examiner or the Court upon oral testimony or other proof which either party may desire to offer. A more adequate record in a proceeding where witnesses may be called and examined and cross examined will enable the Court to determine the petitioner's behavior during the five year period and to adjudicate his rights with more certainty than from the scanty record now available."

A naturalization proceeding is like any other civil case and all the safeguards of the rules of evidence and procedure should be preserved. *Stasiukevich v. Nicolls*, 2 Cir. 168 F. 2d 474, 477:

"A naturalization proceeding is a case or controversy within Article III, section 2 of the Constitution and Section 128 of the Judicial Code, and an order denying a petition for naturalization is a 'final decision' within the meaning of Section 128 of the Judicial Code and as such is appealable to the Circuit Court of Appeals. Congress having, in the Nationality Act of 1940, afforded to aliens an opportunity to be naturalized, 'there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and if the requisite facts

> are established, to receive the certificate * * *. In passing upon the application, the court exercises judicial judgment. It does not confer or withhold a favor.' *Tatun v. United States*, 270 U. S. 568, at page 578, 46 S. Ct. at page 427, 70 L. Ed. 738."

Being in all respects like any other judicial proceeding, the Court must make its findings based on competent evidence and as was said in *Application of Murra*, 7 Cir. 166 F. 2d 605 at page 606:

> "Thus the hearing before the court is not for the purpose of reviewing recommendation of the Examiner; it is a hearing de novo and it is obvious that the Court must decide issues on testimony which it hears, * * *."

It is urged that the Court of Appeals erred in affirming and condoning the trial court wherein it based its decision on incompetent testimony which it did not hear, disregarding the rules of evidence and of judicial process, and decided that the petitioner was not attached to the principles of the Constitution, against the weight of the competent evidence that petitioner was so attached in the form of the testimony of five witnesses in behalf of petitioner, who stated that petitioner was a man of good moral character and that they would vouch for him in his application for citizenship, which was the only evidence produced in the trial court concerning the petitioner's qualifications during the five-year statutory period.

CONCLUSION

The Court of Appeals in holding that the petitioner's naturalization may be denied because of any act of the petitioner during his lifetime and in condoning the action of

the trial court wherein it disregarded the rules of evidence and of judicial process in violation of Section 734, Title Eight, U. S. C. A. (see appendix), has effectively precluded the petitioner from ever becoming a United States citizen, though petitioner's wife has been naturalized and all of petitioner's three children were born in this country. For these reasons, petitioner prays that certiorari be granted and that the decision of the Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX

Title Eight, Chapter Eleven, The Nationality Code, U. S. C. A.

Section 707(a): No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

Section 711: A person who upon the effective date of this section is married to or thereafter marries a citizen of the United States, or whose spouse is naturalized after the effective date of this section, if such person shall have resided in the United States in marital union with the United States citizen spouse for at least one year immediately preceding the filing of the petition for naturalization, may be naturalized after the effective date of this section upon compliance with all requirements of the naturalization laws with the following exceptions:

(a) No declaration of intention shall be required.

(b) The petitioner shall have resided continuously in the United States for at least two years immediately preceding the filing of the petition in lieu of the five-year period of residence within the United States and the six months' period of residence within the State where the naturalization court is held. Oct. 14, 1940, c. 876, Title I, Sub chap. III, 311, 54 Stat. 1145.

Section 733: (a) The Commissioner or a Deputy Commissioner shall designate members of the service to con-

duct preliminary hearings upon petitions for naturalization to any naturalization court and to make findings and recommendations thereon to such court. For such purposes any such designated examiner is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to subpoena witnesses, and to administer oaths, including the oath of the petitioner to the petition for naturalization and the oath of petitioner's witnesses.

(b) The findings of any such designated examiner upon any such preliminary hearing shall be submitted to the court at the final hearing upon the petition with a recommendation that the petition be granted, or denied, or continued, with the reasons therefor. Such findings and recommendations shall be accompanied by duplicate lists containing the names of the petitioners, classified according to the character of the recommendations, and signed by the designated examiner. The judge to whom such findings and recommendations are submitted shall, if he approve such recommendations, enter a written order with such exceptions as the judge may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. One of such lists shall thereafter be filed permanently of record in such court and the duplicate list shall be sent by the clerk of such court to the Commissioner. Oct. 14, 1940, c. 876, Title I, Sub chap. III, 333, 54 Stat. 1156.

Section 734: (a) Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant, and, except as provided in subsection (b) of this section, the witnesses shall be examined under oath before the court and in the presence of the court.

(b) The requirement of subsection (a) of this section for the examination of the petitioner and witnesses under oath before the court and in the presence of the court shall

not apply in any case where a designated examiner has conducted the preliminary hearing authorized by subsection (a) of Section 733; except that the court may, in its discretion, and shall upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath before the court and in the presence of the court.

(c) Except as otherwise specifically provided in this chapter, no final hearing shall be held on any petition for naturalization nor shall any person be naturalized nor shall any certificate of naturalization be issued by any court within thirty days after the filing of the petition for naturalization, nor within sixty days preceding the holding of any general election within the territorial jurisdiction of the naturalization court.

(d) The United States shall have the right to appear before any court in any naturalization proceeding for the purpose of cross examining the petitioner and the witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

(e) It shall be lawful at the time and as a part of the naturalization of any person, for the court, in its discretion, upon the prayer of the petitioner included in the petition for naturalization of such person, to make a decree changing the name of said person, and the certificate of naturalization shall be issued in accordance therewith. Oct. 14, 1940, c. 876, Title I, Sub chap. III, 334, 54 Stat. 1156.